UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

BERKSHIRE FARM CENTER AND SERVICES FOR YOUTH

and **Cases 3-CA-27701**
3-CA-27790

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200 UNITED

Greg Lehmann and Brie Kluytenaar, Esqs., for the Acting General Counsel.
James Ferree, Bernard Burdzinski and Cynthia Sauter, Esqs. (Burdzinski & Partners, Inc.), for the Respondent.
Drew Blanton, Esq., for the Charging Party.

DECISION

Statement of the Case

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Albany, New York, on January 31 and February 1, 2011. The original charge in this proceeding was filed by the Service Employees International Union, Local 200United (the Union) on June 21, 2010.[1] The Union represents a bargaining unit of youth care and primary therapy counselors (the unit), who are employed by the Berkshire Farm Center and Services for Youth (the Respondent or Berkshire) at its Canaan, New York facility (collectively called the parties). On November 24, a consolidated complaint issued, which alleged that Berkshire violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by: unilaterally changing the unit's health insurance coverage; and failing to provide certain relevant information to the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the parties' briefs,[2] I make the following:

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1 All dates herein are in 2010, unless otherwise stated.

2 The Union did not submit a posthearing brief.

Findings of Fact

I. Jurisdiction

At all material times, Berkshire, a not-for-profit corporation, with an office and place of business in Canaan, New York (the Canaan campus), has operated a social services program. In 2009, it derived gross revenues exceeding $250,000, and purchased and received at the Canaan campus goods and services valued in excess of $50,000 directly from points located outside of New York State. As a result, it admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Berkshire further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Berkshire, a social services agency, supports "at-risk" youth. On the Canaan campus, it administers a foster care program, operates a residential unit, and manages a school district. Since 1973, the Union has represented the unit, which consists of approximately 100 youth care and primary therapy counselors employed at the Canaan campus. The Union has, as a result, negotiated a series of collective-bargaining agreements with Berkshire, the most recent of which ran from January 1, 2007, to December 31, 2008 (the CBA). The CBA described, inter alia, Berkshire's obligation to provide health insurance coverage to the unit and pay a percentage of the connected premium.[3] (GC Exh. 2 at 20). The CBA failed, however, to identify specific carriers, plans, copays, deductibles or benefit levels, which is the gravamen of the instant dispute.

B. Bargaining for a Successor Agreement and Final Offer

In their attempt to reach a successor agreement, the parties agreed to extend the CBA through June 30, 2009. (GC Exh. 13). When their negotiations failed, Berkshire declared an impasse and presented a final offer to the Union (the final offer). (GC Exh. 3.) The final offer, which was implemented on November 1, 2009, extended the CBA through June 30 and, inter alia, reduced Berkshire's percentage contribution for health insurance coverage.

C. Health Insurance Coverage Immediately After the Final Offer

Immediately following the implementation of the final offer, unit employees had two health insurance options: Capital District Physicians Health Plan (the CDPHP plan); and Blue Shield of Northeastern New York (the Blue Shield plan). (GC Exhs. 7, 8, 16). Unit employees have been offered the CDPHP and Blue Shield plans since at least 2000, although the features of these plans have periodically changed. (R. Exhs. 1, 3–8).

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[3] Depending upon whether a unit employee elected individual or family coverage, Berkshire's contribution under the CBA ranged from 70 to 100 percent of the health insurance premium cost.

The Blue Shield and CDPHP plans ran from July 1, 2009, through June 30. (GC Exh. 15). The CDPHP plan, which was an exclusive provider plan, offered extensive in-network benefits and significantly limited out-of-network benefits. The Blue Shield plan, which was a preferred provider organization plan, offered financial incentives for the usage of in-network services, but also provided out-of-network services at a higher cost.

The final offer referenced the "Blue Shield plan," but failed to cite the CDPHP plan. The final offer, like the CBA, omitted any discussion of benefit levels, copays, deductibles, or connected plan information.

D. Meetings Regarding Health Insurance Coverage

Over the next several months, the parties met repeatedly to discuss the unit's health insurance coverage. They each had distinct goals. Berkshire sought to control its health insurance costs. The Union, conversely, wanted to maintain a high level of coverage, while limiting the unit's contribution. The Union sought to achieve its goals by transferring the unit into another plan, which was run by 32BJ SEIU, its sister local (the Union Health Fund). The parties appreciated that, because the CDPHP and Blue Shield plans would not expire until June 30, they possessed a lengthy opportunity to address their goals.

On December 4, 2009, the parties held an initial health insurance meeting. Andrea Campbell, the business agent who services the unit, testified that the Union was represented by herself, business agent Michael Lonigro, and several unit members. She related that Berkshire was represented by vice-president of human resources Mark Ciavardoni, attorney James Girvin, and others. She recollected that the Union proposed transferring the unit to the Union Health Fund. She explained that, because family coverage under the Union Health Fund was less costly, the parties were optimistic that an agreement could be reached. She stated that the meeting ended with Berkshire committing to prepare a cost estimate.

On January 7, the parties continued their dialogue. Campbell testified that Berkshire informed the Union that the estimated cost of transitioning to the Union Health Fund was prohibitive, and it was less expensive to remain in the current plans. She recalled being taken aback by this announcement, and grew concerned that their calculations were inaccurate.

On February 25, the parties met again. Campbell testified that Ciavardoni announced that Berkshire was considering withdrawing from the health insurance consortium and was evaluating alternative sources of coverage.[4] She described her reply:

> *I told him that there was a duty to bargain and that any changes are subject to the bargaining process*. . . . I mentioned to him that we still had the . . . [Union Heath Fund] on the table and that it should be considered . . . .

[4] At that time, Berkshire purchased health insurance through a consortium, which permitted members to pool their resources with other local employers, and use their collective purchasing power to obtain more competitive insurance rates.

She recollected that the meeting ended under the following circumstances:

> [P]er Ed Jones'[5] advice that we really couldn't move forward with bargaining if we [did not] know . . . how much money we were going to be spending on health insurance. . . . *we agreed that . . . the agency would keep me posted on where they are with the health insurance and we would reconvene when they got numbers*.

At March and April labor management meetings,[6] Campbell testified that, when she asked Ciavardoni whether he had received a quote from the broker, he replied that he had not and would advise her once it was received. At the May labor management meeting, Campbell described this exchange:

> I asked for an update and he said that the broker was getting . . . back quotes and that they were very close to being able to provide information. I reminded him that . . . . the current policy . . . expired June 30 and . . . you're not giving us much time. *You have a duty to bargain . . . and we're only talking about a . . . month and a half*. . . .

Campbell related that she was never told, at any point, that Berkshire was considering eliminating the CDPHP and Blue Shield plans, and substituting a plan that would eliminate out-of-network benefits, involve higher copays, deductibles, and costs, and make several other significant changes. She reported that she believed that Berkshire was solely utilizing a broker to research whether the CDPHP and Blue Shield plans could be offered at a lower cost.

I credit Campbell's testimony concerning the parties' health insurance discussions prior to the unilateral change. Regarding demeanor, I found her to be candid, honest, consistent, and equally helpful on direct and cross examination. I also note that her testimony regarding these issues was either unrebutted, or corroborated by Ciavardoni.

E. Unilateral Change to the Unit's Health Insurance Coverage

In a letter dated May 28, without prior notification to the Union, Berkshire announced to unit employees that it was changing their health insurance coverage:

> On July 1, 2010, Berkshire . . . will be introducing a new health insurance plan. We will be transitioning our current plans with CDPHP and Blue Shield of NENY into one plan with MVP Healthcare [the MVP plan].
>
> Berkshire will be implementing . . . [the] **MVP** . . . **Plan** with a corresponding **Health Reimbursement Account**. The new . . . plan will have a network deductible of $1,500 for an individual and $3,000 for two person and family. **Please note that to help offset the cost of the deductibles for our employees; Berkshire has decided to establish a Health Reimbursement Account (HRA) for each employee which will be fully integrated with your MVP [plan].**

[5] Ed Jones was a mediator from the Federal Mediation and Conciliation Service.

[6] The parties conduct a labor-management meeting on the second Wednesday of every month. (GC Exh. 2).

> **Berkshire will create an HRA for each employee in the amount of $750.** The first $750 of qualified expenses will be paid 100% through the HRA, employees will be responsible for the remainder of the deductible, and then the plan will pay 100% for balance of the plan year.
>
> The plan year is July 1, 2010 — June 30, 2011. . . .
>
> [The MVP plan] . . . is a network only plan, there are no out of network benefits . . . .

GC Exh. 4 (emphasis as in original).

The following chart summarizes how the unit's coverage changed:

	MVP Plan	CDPHP Plan	Blue Shield Plan
Deductibles	- $1500 for individual coverage. - $3000 for family coverage.	Not applicable.	Deductibles ranging from $100 to $1000 for in-network and out-of-network coverage.
Copay for Office Visits and Services	Not applicable (deductible applies).	- $25 copay for primary care visits - $40 copay for specialist visits.	- $25 copay for in-network coverage. - Deductible and coinsurance for out-of-network coverage.
Vision Coverage	Excluded.	Partially covered.	Partially covered.
Hearing Coverage	Excluded.	Partially covered.	Partially covered.
Prescription Copays	$10 to $50.	$10 to $40.	$10 to $50.
Out-of-Network Coverage	Extremely limited (i.e. out of state emergencies).	Extremely limited (i.e. out of state emergencies).	Yes.

(GC Exhs. 11, 14, 15).

Ciavardoni testified that the May 28 letter was distributed to unit employees, but not sent to the Union, in spite of their ongoing health insurance dialogue and Campbell's repeated requests to bargain. He acknowledged that, shortly after the letter was circulated, Campbell contacted him and protested that the unilateral change was unlawful. He also admitted that the HRAs were unilaterally implemented, without affording the Union notice or an opportunity to bargain.

Campbell testified that a unit member shared the May 28 letter with her. She added that this was her first notification concerning these matters. She stated that, after receiving the letter, she called Ciavardoni and protested the unilateral action. She recalled him replying that this change was permissible under the parties' established past practice of allowing Berkshire to modify the unit's health insurance coverage without bargaining.

I found Campbell's and Ciavardoni's testimonies regarding the unilateral change consistent and credible. Their testimony on these points was corroborative and essentially undisputed.

F. Previous Change's to the Unit's Health Insurance Coverage

From 2000 through 2008, Berkshire made annual changes to the unit's health coverage. (R. Exhs. 1, 3–8). These changes became effective on July 1 of the applicable year. The highlights of these changes were: in 2002, Berkshire ceased offering a Blue Shield Par Plus plan to new unit employees; in 2004, Berkshire eliminated the Blue Shield Par Plus plan for unit employees; and from 2000 through 2008 Berkshire increased copays and deductible costs.

Ciavardoni described his understanding of Berkshire's past practice concerning annual changes to the unit's health insurance coverage:

> My understanding in the past *just from talking to people in the agency* is that it was a management discussion, management would discuss . . . the current plans . . . , they would look at the cost . . . , the cost was . . . pretty heavy . . . because the employer was paying anywhere from 75 to 90 percent . . . , and so . . . historically what the agency has done is it's a management decision where they looked at the plans, they made a decision on what if any changes with the providers. And they had an open enrollment whereby they rolled out and provided information to the employees.

However, he admitted that, because he was only hired in mid-2009, his understanding of the alleged past practice was solely based on hearsay, as opposed to direct knowledge.

Notably, and surprisingly, Berkshire, the Acting General Counsel, and the Union failed to present any witnesses with direct knowledge of the past practice. As noted, Campbell who began servicing the unit in 2009, and Ciavardoni who was not hired until mid-2009, each lacked direct knowledge.[7]

For several reasons, I do not credit Ciavardoni's testimony regarding the past practice. First, I found his demeanor to be less than credible. His testimony was marked by lengthy pauses and spotty recall, and he occasionally appeared less than candid. He often attempted to answer unsolicited questions, as opposed to cooperatively responding to actual questions. He conspicuously parsed the wording of difficult questions, and attempted to avoid a response by asking follow-up queries before answering. Second, Ciavardoni's testimony regarding the past practice is solely based upon uncorroborated hearsay. He acknowledged that he lacked personal knowledge on this issue. Third, Berkshire, without explanation, failed to corroborate his hearsay

[7] Berkshire, inexplicably, was silent regarding its failure to present direct witness testimony concerning this seminal point. Counsel for the Acting General Counsel, however, elicited Campbell's limited explanation for this evidentiary lapse. She testified that, Janice Treanor, the former Union business representative, resigned from her position in 2009, and was no longer employed by the Union. She added that Treanor's absence created an institutional knowledge gap and, as will be discussed, prompted her to request information from Berkshire about this matter.

testimony by presenting a witness with personal knowledge of the past practice. I find it plausible that, if Ciavardoni's testimony *on this key point* were accurate, Berkshire would have bolstered it with multiple witnesses possessing direct knowledge, in order to maximize their chance of winning the litigation. Fourth, I find that the plan summaries that Berkshire submitted, which solely show historical changes to the unit's health coverage, fail to corroborate Ciavardoni's testimony that the Union had a past practice of acquiescing to unilateral health coverage changes. (R. Exhs. 1, 3-8). Simply put, these records fail to shed any light on whether the Union was notified regarding proposed health insurance changes and negotiated the final changes contained in these exhibits. In sum, I do not credit Ciavardoni's testimony on these points.

G. Information Requests

On June 14, Campbell, in furtherance of her desire to research the proclaimed past practice, sent the following information request to Ciavardoni:

> Break down of employee/employer contribution to health insurance plans for the [unit over the] past 7 years. Including plan summary for each of those 7 years.[8]

(GC Exh. 9). On August 5, after receiving no response, Campbell made another request for the same information. (GC Exh. 22).

On August 25, Berkshire sent the Union information concerning the "employee/employer contribution to health insurance plans" for the Blue Shield and CDPHP plans for the previous 3 years.[9] (GC Exh. 10). Its response did not, however, explain its delay or failure to provide the remaining information, which constituted the majority of the Union's request. On September 13, Berkshire sent another piecemeal response, and tendered the CDPHP and Blue Shield plan summaries for the previous 3 years. (GC Exh. 11). This reply, however, like its predecessor, failed to explain the delay, address the omission of the majority of the information (i.e. 4 of the 7 years of data remained missing), or inquire about the information's relevance.

Ciavardoni explained that he delayed in providing the information because transitioning to the MVP plan was a time consuming process, which precluded an earlier response. He added that he failed to provide 4 of the 7 years of data because his staff could not find responsive documents. He contended that, if he possessed more information, he would have gladly sent it. He indicated that he did not appreciate the relevance of the information, but, acknowledged that he never sought an explanation. Ironically, and in spite of his claim that more information was unavailable, his office sent plan summaries that satisfied the Union's information request to attorney Girvin on September 2. (GC Exh. 12 (2008, 2007, 2006, 2004, and 2002 plan summaries)). At the hearing, Ciavardoni was flabbergasted, when asked why his office sent responsive information to Girvin, but, failed to send the same material to the Union.[10]

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8 Berkshire's health insurance plan year ran from July 1 through June 30 of the following year.

9 Berkshire forwarded information covering 2009–2010, 2008–2009, and 2007–2008 plan years.

10 In addition to failing to provide the plan summaries to the Union, Berkshire failed to provide these documents in response to counsel for the Acting General Counsel's subpoena. See (GC Exh. 23). This omission led counsel for the Acting General Counsel to ask for the imposition of sanctions under *Bannon*

Continued

For several reasons, I do not credit Ciavardoni's testimony that his delay was reasonable, and that he was unaware that his office possessed the plan summaries that were disseminated to Girvin. As stated, I found Ciavardoni's demeanor to be less than credible. In addition, I find it likely that, if he genuinely wanted to promptly respond to the Union's concise information request, he would have been able to do so, irrespective of his competing priorities. I also find it implausible that his office was able to locate the documents for Girvin, but simultaneously unable to find the same documents for the Union. I similarly find it probable that Ciavardoni, who knew that the Union opposed the unilateral change to the unit's health coverage, intentionally delayed providing responsive documentation, which could have augmented the Union's ability to challenge the unilateral change. As a result, I do not credit his testimony on these points.

III. Analysis

A. Unilateral Change Allegations

I find that Berkshire violated Section 8(a)(5), when it unilaterally changed the unit's health insurance coverage and implemented the HRAs. Health insurance coverage and related benefits are mandatory subjects of bargaining. *Larry Geweke Ford*, 344 NLRB 628 (2005). Generally, when an employer fails to provide a union with notice and a meaningful opportunity to bargain about a change in health insurance coverage, this unilateral action is unlawful. *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001); *Pioneer Press*, 297 NLRB 972, 976 (1990). Even when an employer retains substantial discretion regarding the content of a unit's health insurance coverage, unilateral changes remain unlawful. See, e.g., *Larry Geweke Ford*, supra; *Mid-Continent Concrete*, supra; *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1265 (1997). Moreover, even if an employer provides health insurance on a companywide basis for its employees, and annually modifies their coverage, it is not relieved of the obligation to bargain over health insurance changes for unit employees. *Larry Geweke Ford*, supra; *Mid-Continent Concrete*, supra.

Berkshire changed the unit's health insurance coverage and implemented HRAs, mandatory subjects of bargaining, on July 1 without affording the Union notice or an opportunity to bargain regarding these changes or their effects. As noted, the implementation of the MVP plan, inter alia: essentially eliminated out-of-network benefits; increased copay, prescription and deductible costs; and diminished vision and hearing coverage. Campbell was advised concerning the unilateral change on May 28, after reviewing a letter provided to her by a unit employee. Berkshire never directly notified the Union about its contemplated changeover to the MVP plan, even though the parties' engaged in repeated meetings regarding health insurance, and Ciavardoni continuously pledged to advise the Union once information became available. Moreover, Ciavardoni repeatedly answered Campbell's requests to bargain with a pledge that he would provide her with details of the broker's quote as soon as they became available. As a result, he misled Campbell into believing that bargaining would commence, once he provided such information. Once Campbell finally read the May 28 letter, the unilateral changeover to the

Mills, 146 NLRB 611 (1964). The request for *Bannon Mills* sanctions is denied, inasmuch as counsel for the Acting General Counsel was not prejudiced by this omission.

MVP plan was a fait accompli, which was set to occur on July 1, irrespective of the Union's protest and prior requests to bargain. When Campbell contacted Ciavardoni and objected, he replied that Berkshire's unilateral action was a permissible past practice. Under these circumstances, I find that the Union was deprived of notice and a meaningful opportunity to bargain about the change in the unit's health insurance coverage, the implementation of the HRAs, as well as the effects of these actions.

In its defense, Berkshire avers that it legitimately implemented the MVP plan and the HRAs pursuant to its past practice of annually changing the unit's health coverage, without conferring with the Union. The Respondent bears the burden of establishing this affirmative defense. *E.I. Dupont De Nemours, Louisville Works*, 335 NLRB No. 176, slip op. at 2 (2010). In *E.I. Dupont De Nemours, Louisville Works*, the Board held:

> [An] employer's unilateral changes to employees' health care premiums during a hiatus period between contracts . . . [are] lawful . . . [where] the employer had established a past practice of making such changes both during periods when a contract was in effect and during hiatus periods. [Where] . . . Respondent's asserted past practice . . . , in contrast, was limited to changes that had been made when a contract, which included the reservation of rights language, was in effect . . . . a union's acquiescence to unilateral changes made under the authority of a controlling management-rights clause has no bearing on whether the union would acquiesce to additional changes made after that management-rights clause expired. . . . [Under such circumstances,] Respondent's prior unilateral changes do not establish a past practice justifying the Respondent's unilateral actions during a hiatus between contracts.

Id.

I find that Berkshire failed to prove that it lawfully implemented the MVP plan pursuant to a past practice. First, although Berkshire demonstrated that annual changes have been made to the unit's health insurance coverage since 2000 (R. Exhs. 1, 3–8), it neglected to prove that such changes were unaccompanied by notice and bargaining. As discussed, I did not credit Ciavardoni's testimony on this point. Second, even assuming arguendo that Berkshire had established a past practice of making annual unilateral health coverage changes, it failed to show that the, "past practice of making such changes [occurred] both during periods when a contract was in effect and during hiatus periods." See *E.I. Dupont De Nemours, Louisville Works*, supra. The evidence reveals that Berkshire consistently made changes to the unit's health insurance coverage on July 1, which is a date that uniformly occurred while the parties' contracts were in effect.[11] Simply put, there is no evidence that any health coverage changes were made during hiatus periods, as is the case herein. I find, therefore, that the past practice defense lacks merit.

Berkshire also contends that its practice of providing the same health insurance coverage to unit and nonunit employees legitimatized its unilateral change concerning the unit. This position is flawed, and ignores the well-established principle that health insurance is a mandatory

[11] (GC Exhs. 2, 18–21)(coverage changes made prior to December 31, 2008 occurred while the parties' collective bargaining agreements were in effect).

subject of bargaining, and a past practice of providing the same health plan for all its employees on a companywide basis does not exempt an employer from its bargaining obligation regarding unit employees. *Mid-Continent Concrete*, supra at 259.

Berkshire further asserts that the unilateral change allegation is untimely.[12] Section 10(b) provides, in relevant part, that:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

The 10(b) period, however, does not begin to run until the aggrieved party has received notice of the disputed conduct. *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1016 (2005). The burden of showing clear and unequivocal notice rests with the party raising this defense. *Dedicated Services*, 352 NLRB 753, 759 (2008). Section 10(b) will not bar a charge where an employer has sent conflicting or ambiguous signals. *Concourse Nursing Home*, 328 NLRB 692, 694 (1999).

Berkshire contends that the Union was notified concerning the July 1 unilateral change, when it received the final offer on October 13, 2009. I find that this argument is invalid because the final offer failed to announce the forthcoming elimination of the Blue Shield and CDPHP plans, or even hint at the transition to the MVP plan. The final offer even described, "the current Blue Shield plan," which, if anything, suggested that this plan would continue. Lastly, it is unlikely that even Berkshire knew of the forthcoming unilateral change when the final offer was made, given that it was still awaiting a quote from its insurance broker regarding the MVP plan at that time. I find, therefore, that the Union was never afforded clear and unambiguous notice of the unilateral change in the final offer, and did not receive such notice until Campbell read the May 28 letter. The charge, as a result, was not barred under Section 10(b).

B. Information Requests

I find that Berkshire violated Section 8(a)(5), when it unreasonably delayed providing some information to the Union, and failed to provide the remaining information. Upon request, an employer is obligated to provide the collective-bargaining representative of its employees with information that is necessary and relevant to its representational capacity. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Relevancy is assessed under a broad discovery type standard, and it is only necessary to establish the probability that the information sought would be useful to the union in carrying out its role. Id. The Board has, thus, held that information regarding health insurance for unit employees is presumptively relevant. See, e.g., *Honda of Hayward*, 314 NLRB 443 (1994); *Ideal Corrugated Box Corp*., 291 NLRB 247, 248 (1988).

The Board has also held that an employer's unreasonable delay in furnishing information "is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Woodland Clinic*, 331 NLRB 735, 736 (2000) citing *Valley Inventory Service*, 295 NLRB

[12] Although this defense was not raised in the answer, it was properly raised at the hearing. *Public Service Co.*, 312 NLRB 459, 461 (1993).

1163, 1166 (1989). Month-plus delays, which are unaccompanied by legitimate excuse, are generally unlawful. See, e.g., *Pan American Grain*, 343 NLRB 318 (2004), enfd. in relevant part, 432 F. 3d 69 (1st Cir. 2005) (3-month delay); *Bundy Corp*., 292 NLRB 671, 672 (1989) (2-month delay); *Woodland Clinic*, supra at 737 (7-week delay); *Quality Engineered Products*, 267 NLRB 593, 598 (1983) (6-week delay); *International Credit Service*, 240 NLRB 715, 718 (1979) (6-week delay); *Pennco Inc.*, 212 NLRB 677, 678 (1974) (1-month delay).

I find that Berkshire's delay and ongoing failure to provide information to the Union was unlawful. On June 14, Campbell requested the unit's percentage "contribution to health insurance plans . . . [and] plan summaries" over the last 7 years. (GC Exh. 9). On August 5, after her first request was ignored, she requested the same information. (GC Exh. 22). On August 25, Berkshire partially responded and sent the unit's percentage "contribution to health insurance plans" for the previous 3 years. (GC Exh. 10). This response failed to explain the delay or address why most of the information remained missing. On September 13, Berkshire sent another piecemeal response and sent the CDPHP and Blue Shield plan summaries for the previous 3 years. (GC Exh. 11). This reply also failed to explain the delay or address why most of the information still remained missing. To date, Berkshire has never provided the Union with cost-sharing data or plan summaries for the full 7-year period.

The Union's information request, which concerned the unit's health insurance coverage, was abundantly relevant. It was entitled to review cost sharing data and plan summaries for the unit's health insurance coverage for the last 7-year period. Such information would have minimally permitted it to prepare for its ongoing health insurance discussions with Berkshire, and afforded it an opportunity to assess what prior cost and benefit changes the unit had accepted. This information would have also allowed it to independently evaluate the past practice claim.

Berkshire's delay in providing certain information was unreasonable. It waited 2 months before providing limited cost-sharing information,[13] and 3 months before providing partial plan summary information. In its defense, Ciavardoni testified that his office was "too busy" to provide a timelier response. As discussed, I do not credit this testimony. I find, as a result, that Berkshire could have provided a more timely response, if it acted with greater diligence and that its multi-month delay was flatly unreasonable.

Berkshire's failure to completely respond to the plan summary request was, similarly, unreasonable. The summaries were readily available and were provided to attorney Girvin. As stated, I do not credit Ciavardoni's testimony that he was unaware that these summaries existed.

Accordingly, I find that Berkshire violated the Act by delaying its partial response to the Union, and by wholly failing to provide the remainder of the information. The requested information was relevant and Berkshire's explanations were unreasonable.

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[13] As noted in counsel for the Acting General Counsel's brief, "the Union is satisfied with Respondent's response to the cost-sharing portion of the information request, but . . . objected[ed] to the unwarranted delay in providing the information." (GC Brief at 15). As a result, I solely addressed Berkshire's delay in providing the cost sharing data.

Conclusions of Law

1. Berkshire is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and, at all material times, was the exclusive bargaining representative for the following appropriate unit:

> All full-time regular, part-time and per diem youth care and primary therapy counselors employed by Berkshire at its Canaan, New York facility, excluding all guards, and professional employees, and supervisors as defined by the Act.

4. Berkshire violated Section 8(a)(1) and (5) of the Act by delaying in providing, or failing and refusing to provide, relevant and necessary information concerning bargaining unit employees' health insurance coverage, which was requested by the Union in letters dated June 14 and August 5.

5. Berkshire violated Section 8(a)(1) and (5) of the Act by unilaterally changing bargaining unit employees' health insurance coverage.

6. Berkshire violated Section 8(a)(1) and (5) of the Act by unilaterally creating HRAs for unit employees.

7. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Berkshire has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Berkshire must provide the requested plan summaries to the Union for the 2009-2010 through 2003–2004 plan years, to the extent that such information has not already been provided.

Berkshire is required to restore the status quo ante by, upon request by the Union, restoring the 2009–2010 CDPHP and Blue Shield plans to the unit, with their preunilateral change costs, deductibles, copays, and benefit levels. *Larry Geweke Ford*, supra at 629; *Mid-Continent Concrete*, supra at 262. If requested by the Union, Berkshire shall also rescind the HRAs established on July 1. Berkshire shall, additionally, reimburse unit employees for any expenses resulting from its unilateral implementation of the 2010–2011 MVP plan. Such reimbursement shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Berkshire will, however, be permitted to litigate at a compliance proceeding whether it would be impossible or unduly burdensome to restore the 2009–2010 CDPHP and Blue Shield

plans. See *Larry Geweke Ford*, supra at 629.

Berkshire is ordered to distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its youth care and primary therapy counselors at the Canaan campus, in addition to the traditional physical posting of paper notices. See *J Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Berkshire Farm Center and Service for Youth, Canaan, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Delaying the provision of, and failing to provide, relevant and necessary information requested by the Union concerning bargaining unit employees' health insurance coverage. The appropriate bargaining unit is:

> All full-time regular, part-time and per diem youth care and primary therapy counselors employed by Berkshire at its Canaan, New York facility, excluding all guards, and professional employees, and supervisors as defined by the Act.

b. Implementing new health insurance coverage and HRAs without bargaining with the Union.

c. Refusing to bargain with the Union regarding health insurance coverage and HRAs.

d. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Provide to the Union all of the information that it requested in its June 14 and August 5, 2010 letters regarding the unit employees' health insurance cost sharing data and health insurance plan summaries, to the extent that Respondent has not already done so.

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[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

b. Upon request by the Union, bargain in good faith regarding the unit's health insurance coverage and HRAs.

c. Upon request by the Union, rescind the HRAs, and/or the MVP plan, and restore the 2009–2010 CDPHP and Blue Shield plans that were in existence immediately before Respondent unilaterally eliminated such plans and transitioned to the MVP plan.

d. Make employees whole, with interest, for their increased health benefit costs under the MVP plan, which includes: higher copay and deductible costs; increased costs associated with the elimination of the vision and hearing coverage; elevated prescription charges; and additional costs associated with the elimination of out-of-network benefits.

e. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of health insurance reimbursement monies due under the terms of this Order.

f. Within 14 days after service by the Region, physically post at the Canaan campus, and electronically distribute via email, intranet, internet, or other electronic means to its youth care and primary therapy counselors who were employed by the Respondent at the Canaan campus at any time since May 28, 2010, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be physically posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 28, 2010.

g. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 27, 2011

Robert A. Ringler
Administrative Law Judge

[15] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically,

WE WILL NOT delay the provision of, or fail to provide, relevant and necessary information requested by the Union, as the exclusive bargaining representative of the employees in the following appropriate unit, concerning their health care benefits:

> All full-time regular, part-time and per diem youth care and primary therapy counselors employed by Berkshire at its Canaan, New York facility, excluding all guards, and professional employees, and supervisors as defined by the Act.

WE WILL NOT refuse to bargain with the Union regarding health insurance coverage and health reimbursement accounts.

WE WILL NOT establish new health insurance coverage or health reimbursement accounts without first bargaining with the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide to the Union all of the information requested in its June 14 and August 5, 2010 letters regarding employees' health insurance cost sharing data and health insurance plan summaries.

WE WILL, upon request by the Union, bargain in good faith with the Union over changes to the health insurance coverage and the creation of health reimbursement accounts.

WE WILL, upon request by the Union, rescind the health reimbursement accounts and/or the MVP plan, and restore the 2009–2010 CDPHP and Blue Shield plans that were in effect immediately before we unilaterally eliminated these plans and switched over to the MVP plan.

WE WILL make employees whole, with interest, for their increased health benefit costs under the MVP plan, which includes: higher copay and deductible costs; increased costs associated with the elimination of the vision and hearing coverage; elevated prescription charges; and additional costs associated with the elimination of out-of-network benefits.

BERKSHIRE FARM CENTER
AND SERVICES FOR YOUTH
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Leo W. O'Brien Federal Building, Clinton Ave and N Pearl Street, Room 342, Albany, NY 12207-2350

(518) 431-4155, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4931.